



**House
Legislative
Analysis
Section**

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POST-EMPLOYMENT RESTRAINTS

House Bill 4072 as introduced
First Analysis (3-11-87) Floor Copy

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Sponsor: Rep. Claude Trim
Committee: Judiciary

APR 08 1987

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THE APPARENT PROBLEM:

Among the statutes repealed by the Michigan Antitrust Reform Act (Public Act 274 of 1984) was Public Act 329 of 1905, which among other things generally prohibited the enforcement of employment covenants whereby an employee agrees not to compete with the employer after leaving the firm; such covenants generally were permitted if necessary to prevent the "theft" of customers and if they did not extend beyond 90 days after employment terminated. According to at least one antitrust expert, Michigan courts tended to uphold post-employment restraints that appeared to conflict with the statute, if necessary to protect an employer's legitimate interest, and the judicial reluctance to apply the old law was a factor in its repeal. However, the repeal of the old law left a gap in statute: were post-employment covenants legal or not and under what conditions? Some who believe that the state has an interest in ensuring that overly restrictive covenants, with their implications for restraint of trade, are not made or enforced, have proposed language to fill the statutory void.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Antitrust Reform Act to, with certain exceptions, prohibit an employer from obtaining from any employee an agreement prohibiting the employee from engaging in any employment or line of business after employment was terminated. Such an agreement would be permitted if its purpose was to prohibit the disclosure of trade secrets or to prohibit the employee from soliciting the employer's customers for not more than 90 days after employment terminated, or if its contents pertained to employee services that were "special, unique, or extraordinary." An employee's services would meet this standard if the employee participated in policy-making decisions and had access to corporate planning materials or confidential employment materials (MCL 445.774a).

FISCAL IMPLICATIONS:

The bill has no fiscal implications for the state.

ARGUMENTS:

For:

The bill would enact reasonable restrictions on the use of employee post-termination covenants, and would fill a statutory void created when the Michigan Antitrust Reform Act repealed earlier restrictions. The covenants would be permitted to the degree necessary to protect an employer's legitimate interests in trade secrets, client lists, and corporate planning or confidential employment materials. The bill is modeled after New York law and also recognizes a recent Michigan Supreme Court decision that upheld an agreement that protected trade secrets.

Against:

The bill is not necessary. The public interest and rights of employees and employers would be sufficiently well served, as they are in many other states, by the common law test of reasonableness, which courts would employ in the absence of a specific statute on post-employment covenants. This test would weigh the various interests of employer, employee, and the public on a case-by-case basis. As articulated in a dissenting opinion filed with a 1976 Michigan Supreme Court decision, "a non-competition forfeiture clause is a reasonable restraint of trade only if it 1) is no greater than necessary for the protection of the legitimate interests of the employer; 2) does not impose undue hardship on the employee; and 3) is not injurious to the interests of the public." By attempting to cover specific situations, the bill risks the sorts of complications that can arise when the unforeseen occurs.

Response: The bill offers employees, employers, and the courts clear, specific statutory guidelines. "The rules of the game" would be evident to all.

Against:

The bill raises the question of what standards are to be applied in cases arising from the period extending from the time the old law was repealed to when the bill is enacted. To minimize future confusion, this issue should be resolved legislatively, if possible.

POSITIONS:

The Antitrust Section of the State Bar of Michigan has some concerns regarding the bill, is reviewing it, but does not have a position at this time (3-10-87).

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